IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JANET HOPKINS,
Plaintiff/Appellant,

v.

LUIS PUIG, IN HIS INDIVIDUAL CAPACITY; AND
CELIA SOTO, IN HER INDIVIDUAL CAPACITY,
Defendants/Appellees.

No. 2 CA-CV 2014-0015
Filed October 23, 2014

Appeal from the Superior Court in Pima County
No. C20131631
The Honorable Gus Aragón, Judge

AFFIRMED

COUNSEL

HopkinsWay PLLC, Phoenix
By Edward C. Hopkins Jr.
Counsel for Plaintiff/Appellant

Thomas C. Horne, Arizona Attorney General, Phoenix
By Jeremy J. Butler, Assistant Attorney General, Tucson
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Plaintiff Janet Hopkins appeals from the dismissal of her claims against defendants Luis Puig and Celia Soto and the resulting judgment entered in their favor. Specifically, Hopkins maintains the trial court erred in holding that her lawsuit, filed against public employees, failed to comply with the requirements that she first file a notice of claim and that any such claim be filed within one year. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "In reviewing a trial court's decision to grant a motion to dismiss, we assume the truth of the facts asserted in the complaint." *Sw. Non-Profit Housing Corp. v. Nowak*, 234 Ariz. 387, ¶ 4, 322 P.3d 204, 206 (App. 2014). On September 19, 2007, Hopkins visited the University of Arizona Police Department (UAPD). Hopkins, an employee of "a federal government contractor that performs background investigations" for the U.S. government, was seeking information regarding a person who was the subject of a federal investigation. Hopkins gave Soto, an employee of the UAPD, an "Authorization for Release of Information" form, and Soto provided Hopkins with a copy of a traffic citation issued to the subject of the investigation by the UAPD.

¶3 In October 2007, Agent Ronald Pullen of the U.S. Office of Personnel Management (OPM) began investigating Hopkins. As part of his investigation, Pullen spoke to Soto and Soto's supervisor, Puig. Soto and Puig told Pullen that Soto had not found any records

pertaining to the subject of Hopkins's investigation and therefore had not given Hopkins any such record. When Pullen interviewed Hopkins, she told him she had received a record from Soto. This conflicting testimony caused the OPM to "determine[] . . . Hopkins lacked the integrity and trustworthiness to maintain her credentials and security clearance." OPM revoked Hopkins's credentials and security clearance, which caused her to lose her employment.

¶4 In March 2010, the Pima County Sheriff's Department (PCSD), using a "System Log Table search," discovered that, on September 19, 2007, Soto had found a record related to the subject of Hopkins's investigation. Neither Soto nor Puig had informed Pullen about this means of determining whether Soto had actually found a record on September 19, 2007, nor was Hopkins aware before March 2010 that this record search had been possible.

¶5 In March 2013, Hopkins filed a complaint against Puig and Soto, and in July 2013, she filed an amended complaint, alleging fraudulent misrepresentation, civil conspiracy, aiding and abetting, and punitive damages. The trial court dismissed Hopkins's claims under Rule 12(b)(6), Ariz. R. Civ. P., finding that they were "barred by: res judicata; failure to comply with the notice of claim statute; and the statute of limitations," and additionally that Hopkins had waived her claims "by failure to pursue remedies under Arizona Rules of Civil Procedure, Rule 59." Hopkins appealed, claiming the trial court erred in concluding she was required to comply with the notice of claim statute and the one-year statute of limitations on suits against public employees. *See* A.R.S. §§ 12-821, 12-821.01. Specifically, she contends that Puig and Soto were not acting in the course and scope of their public employment when they allegedly provided Pullen false information. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Course and Scope

¶6 Hopkins first claims, essentially, that the court erred in dismissing her complaint pursuant to §§ 12-821 and 12-821.01 because her complaint alleged that she was suing Puig and Soto in their individual capacities. She asserts the trial court was obligated

to accept this as a true fact in considering the motion to dismiss.[1] "We review de novo the granting of a motion to dismiss pursuant to Rule 12(b)(6)." *Blankenbaker v. Marks*, 231 Ariz. 575, ¶ 6, 299 P.3d 747, 749 (App. 2013). While, as noted above, we accept as true the "well-pleaded facts alleged in the complaint . . . we do not accept as true . . . legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, ¶ 4, 121 P.3d 1256, 1259 (App. 2005).

¶7 In general, whether an employee acted within the course and scope of his or her employment is a question of fact. *Higginbotham v. AN Motors of Scottsdale*, 228 Ariz. 550, ¶ 5, 269 P.3d 726, 728 (App. 2012). It may, however, be a question of law if the undisputed facts clearly establish that the conduct was within the scope of employment. *Id.* The "'basic test'" in determining the course and scope of employment is "the extent to which the employee was subject to the employer's control." *Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, ¶ 10, 280 P.3d 599, 601-02 (2012), *quoting State v. Superior Court* (*Rousseau*), 111 Ariz. 130, 132, 524 P.2d 951, 953 (1974). Factors a court will consider include "whether the act (a) was the kind the employee was hired to perform, (b) was commonly done by the employee, (c) occurred within the employee's working hours, and (d) furthered the employer's purposes or fell outside the employer's 'enterprise.'" *Id.* ¶ 11.

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[1]The trial court concluded that Hopkins was estopped from claiming Puig and Soto were not public employees because she had claimed Soto was a public employee in a previous suit and "[t]here is no logical or legal reason to treat Puig differently than Soto in analyzing course and scope of employment." As Puig and Soto concede, we cannot affirm on this basis because an essential element of judicial estoppel is that "the party asserting the inconsistent position must have been successful in the prior judicial proceeding," and Hopkins was not successful in her previous suit. *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996). But the trial court also determined that Puig and Soto were acting within the scope of their employment, and "we may affirm the grant of a motion to dismiss on any applicable basis." *Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, ¶ 15, 326 P.3d 335, 339 (App. 2014).

¶8 Hopkins does not allege that providing information to Agent Pullen was outside the course and scope of Puig and Soto's employment. Instead, she attempts to draw a distinction between providing information to Agent Pullen and "mak[ing] unlawful fraudulent misrepresentations" to him. She asserts that, because the trial court was required to accept as true that Puig and Soto "could not have been authorized" to lie to Agent Pullen and that their conduct violated several state and federal laws, it could not properly conclude that they had acted within the course and scope of their employment.

¶9 Arizona case law does not support this proposition. In determining whether an employee has acted within the course and scope of employment, the central question is whether, at the time of the act, the employer had the right to control the employee, not whether the conduct was authorized. *Engler*, 230 Ariz. 55, ¶ 10, 280 P.3d at 601-02. Indeed, an employee's conduct may fall within the scope of his or her employment "'even if the employer has expressly forbidden it.'" *Dube v. Desai*, 218 Ariz. 362, ¶ 11, 186 P.3d 587, 590 (App. 2008), *quoting McCloud v. State*, 217 Ariz. 82, ¶ 29, 170 P.3d 691, 700 (App. 2007). Nor does the fact that an employee's conduct was illegal bar a finding that it was within the course and scope of employment. Acts may be within the course and scope of employment "even if consciously criminal or tortious." *State v. Schallock*, 189 Ariz. 250, 259, 941 P.2d 1275, 1284 (1997); *accord Higgins v. Assmann Elecs., Inc.*, 217 Ariz. 289, ¶ 32, 173 P.3d 453, 461 (App. 2007); *see Dube*, 218 Ariz. 362, ¶ 11, 186 P.3d at 590 ("An employee's improper actions . . . will be deemed motivated to serve the employer if those actions are incidental to the employee's legitimate work activity."). Therefore, even accepting as true all of the facts in Hopkins's complaint, those facts fail to demonstrate that Puig and Soto's employer, the UAPD, had no right to control their actions when responding to Pullen's inquiry.

¶10 Accordingly, the trial court did not err in determining Puig and Soto's allegedly tortious acts occurred within the course and scope of their public employment. Lawsuits based on such acts are governed by §§ 12-821 and 12-821.01. Hopkins's cause of action accrued no later than June 2, 2011, when she learned there was

"irrefutable proof that . . . Soto found records pertaining to the Subject [of Hopkins's investigation] on September 19, 2007." But Hopkins did not file suit until March 2013, well beyond the one-year limitation imposed by § 12-821. Section 12-821 therefore bars Hopkins's action.

¶11 Additionally, Hopkins did not file the notice of claim required by § 12-821.01. Hopkins asserts that *Crum v. Superior Court*, 186 Ariz. 351, 922 P.2d 316 (App. 1996), supports the proposition that "[i]f a plaintiff . . . did not allege the defendant was acting within the course and scope of the defendant's employment . . . and the plaintiff seeks no recovery against any public entity . . . then the plaintiff is not required to file a notice of claim." Hopkins also argues the reasoning in *Crum* precludes a trial court from deciding the question of course and scope of employment in ruling on a motion to dismiss. We do not read *Crum* so broadly.

¶12 In *Crum*, whether the defendant was acting in the course and scope of his employment was not clearly established by undisputed facts. *Id.* at 353, 922 P.2d at 318. The court explained that the issue was therefore "to be decided by the trier of fact"; it noted that, if the factfinder determined the defendant had been acting in the scope of his employment, the plaintiff would take nothing because he had not filed the notice required by § 12-821.01. *Crum*, 186 Ariz. at 353, 922 P.2d at 318. The court did not address a situation where, as here, a plaintiff has failed to allege any facts sufficient to show that the defendants were not acting within the course and scope of employment. Under these circumstances, the issue is a question of law, rather than a question of fact. *See Higginbotham*, 228 Ariz. 550, ¶ 5, 269 P.3d at 728. Furthermore, the purpose of § 12-821.01 is "to allow the entity *and employee* the opportunity to 'investigate and assess their liability.'" *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 25, 160 P.3d 223, 230 (App. 2007), *quoting Crum*, 186 Ariz. at 352, 922 P.2d at 317 (emphasis added). We decline Hopkins's invitation to relieve plaintiffs of the duty to comply with § 12-821.01 simply because they purport to sue public employees in their individual capacities. Such a rule would enable plaintiffs to rely on strategic pleading to circumvent the protections afforded by § 12-821.01.

Disposition

¶13 Because Hopkins's complaint against Puig and Soto concerns actions taken within the course and scope of their employment, and she did not file a notice of claim or a timely complaint, Hopkins's suit is barred by both §§ 12-821 and 12-821.01.[2] The judgment of the trial court granting Puig and Soto's motion to dismiss the complaint is affirmed.

[2]Because we find the trial court correctly dismissed the case pursuant to §§ 12-821 and 12-821.01, we need not address Hopkins's additional argument that her claims were not subject to preclusion.